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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 726

CHARLENE MITCHELL, *et al.*,

Appellants,

—v.—

JOSEPH L. DONOVAN, Secretary of State of the State of Minnesota and DOUGLAS M. HEAD, Attorney General of the State of Minnesota,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

REPLY TO MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO AFFIRM THE JUDGMENT ENTERED BELOW

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The appellees, in their Motion to Dismiss Appeal or, in the Alternative, to Affirm the Judgment Entered Below, do not contest the appellants' contentions that this case presents substantial federal questions. Appellants discussed this in the Jurisdictional Statement, pages 17-24, and are supported by the three-judge court opinions of October 2, 1968, and July 14, 1969. The appellants are further supported in their contention that this case presents substantial federal questions by the posture of the United States Attorney in his *amicus curiae* brief to the three-judge court

and by Mr. Justice Harlan in *Communist Party U.S.A. v. Catherwood*, 367 U.S. 389 (1961). Therefore, the appellants will not discuss this further in their reply.

Appellees' questions 3, 4 and 5 discuss whether the case is moot and whether there is an actual controversy. Appellants fully discuss these questions in their Jurisdictional Statement, pages 12-17, and will not repeat their discussions of these questions in their reply.

Appellees, in their motion, discuss in questions 1 and 2, whether the three-judge district court properly found jurisdiction of the subject matter, and whether the three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282. Appellants and appellees fully briefed and argued these questions before a single judge court and twice subsequently before a three-judge court. In view of the fact that these questions were not discussed at length in the Jurisdictional Statement, this brief reply will amplify that discussion.

The specific questions discussed below are:

(1) Whether the three-judge district court properly found jurisdiction of the subject matter; and

(2) Whether a three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282.

(1) *Whether the three-judge district court properly found jurisdiction of the subject matter.*

Appellees, in their motion, incorrectly assess the findings of the three-judge district court in regard to jurisdiction.

Appellees, in their motion, state, "The three-judge District Court, convened pursuant to 28 U.S.C. §§2282 and

2284, to determine the issues below, based its jurisdiction over the subject matter upon 28 U.S.C. §1331." (p. 2). Further, appellees assert, "Although probable jurisdiction was noted by the one-judge court by invoking 28 U.S.C. §§1331 and 1343, it is obvious that the three-judge court granted its temporary injunction on October 2, 1968, on the jurisdictional basis of 28 U.S.C. §1331, alone." (p. 13); and again appellees state, "Although it is clear that the three-judge court below premised its jurisdiction upon 28 U.S.C. §1331, and that such jurisdiction is absent, there is also a lack of original jurisdiction under the Civil Rights Act."

Appellees argue the three-judge court premised its jurisdiction alone on 28 U.S.C. 1331, and devote much argument to the contention that the requisite $10,000 is not shown.

It is clear that the three judges of the three-judge district court unanimously based jurisdiction on the Federal Civil Rights Act, 42 U.S.C. 1983, 28 U.S.C. 1343.

Following extensive briefs and arguments, the three-judge court in its opinion filed October 2, 1968, found:

> "While answers to the questions of jurisdiction and the necessity of a statutory three-judge court are not completely clear, the court, acting through a single judge, has made an initial determination that jurisdiction does exist, 28 U.S.C.A. §§1331, *1343*, and that a statutory three-judge court should be convened to further consider the issues involved. 28 U.S.C.A. §§2282; 2284. *Flast* v. *Cohen*, 392 U.S. 83, 88 S.Ct. 1942 (1968)." (Three-judge court opinion October 2, 1968, Jurisdictional Statement Appendix, p. 27). (Italics supplied.)

This finding of jurisdiction based upon 28 U.S.C.A. 1331 and the *Federal Civil Rights Act, 28 U.S.C.A. 1343* was made by Chief District Judge Devitt and Circuit Judge Blackmun.

In a concurring opinion, District Judge Neville based jurisdiction of the subject matter solely on the Federal Civil Rights Act, 28 U.S.C.A. 1343.

> "I would prefer to bottom jurisdiction on 42 U.S.C. §1983 (Civil Rights Act) and 28 U.S.C. §1343 rather than on 28 U.S.C. §1331. Although in voting cases, proof of the monetary value of the denial of the right to vote to one or to many people perhaps can or at least might well be presumed to be worth the jurisdictional $10,000 amount, sections 1983 and 1343 require no financial amount to be involved. It seems clear to me that the Secretary of State here acted 'under color of [a] statute' of Minnesota. The action of the Secretary of State determining that a statute permitting filing as a political candidate by petition did not apply, for whatever reason, is acting under color of state law. Failure or refusal to apply a law is as much 'action under color of law' as is the reverse. Also I agree that a three-judge court is proper." (Concurring opinion of the three-judge court October 2, 1968, Jurisdictional Statement Appendix, pp. 34 and 35.)

It is clear from the opinions rendered October 2, 1968, that the three judges unanimously agreed that there was original jurisdiction of the subject matter under the Federal Civil Rights Act, 28 U.S.C.A. 1343. Also, all three judges unanimously found the convening of a three-judge district court under 28 U.S.C.A. 2282 proper.

In the following months appellees and appellants submitted further briefs on the appellants' motion to amend the complaint, which was granted, and the appellees' motion to dismiss, which was granted. Following careful consideration over a 9-month period, the three-judge district court issued an opinion which again unanimously recognized jurisdiction based upon the Federal Civil Rights Act, 28 U.S.C.A. 1343:

> "In response to the original complaint, probable jurisdiction was noted, *28 U.S.C.A. §1343,* and a statutory three-judge court was convened, 28 U.S.C.A. §2282, 2284, to consider further the issues raised by the pleadings." (Opinion of the three-judge court July 14, 1969, Jurisdictional Statement Appendix, p. 39.) (Italics supplied.)

Under the Federal Civil Rights Act it is not required to show an amount in controversy. The appellees do not contest the appellants' assertion that the right to vote is a privilege secured by the United States Constitution, or that the Federal courts have original jurisdiction to protect that right under the Federal Civil Rights Act. See *Baker* v. *Carr,* 369 U.S. 186 (1962); *Carrington* v. *Rash,* 380 U.S. 89 (1965); *Davis, Assessor-Collector of Taxes, Bexas County, Texas, et al.* v. *Mabry, et al.,* 380 U.S. 251 (1965); *Harman* v. *Forssenius,* 380 U.S. 528, affirming *Forssenius* v. *Harman,* 235 F. Supp. 66 (1964); *Ray* v. *Blair,* 343 U.S. 214 (1952); *Reynolds* v. *Sims,* 377 U.S. 533 (1963); *Swafford* v. *Templeton,* 185 U.S. 487 (1902); *United States* v. *Classic,* 313 U.S. 299 (1941); *Wiley* v. *Sinkler,* 179 U.S. 58 (1900).

Original jurisdiction has been found under the Federal Civil Rights Act in a number of cases following the No-

vember 5, 1968, general election, and are discussed in the appellants' Jurisdictional Statement.

Appellees contend, however, that they did not act under color of state law because the appellee Attorney General based his opinion that the the appellant candidates were barred from the ballot on his interpretation of an Act of Congress, the Communist Control Act of 1954, 50 U.S.C.A. 841, 842. The three judges of the three-judge court unanimously, in both opinions, rejected this contention by basing jurisdiction on the Federal Civil Rights Act. In the second opinion of the three-judge court, July 14, 1969, the sole jurisdictional citation was 28 U.S.C.A. 1343, and the court made no comment that jurisdiction might be questionable.

Appellees cite *Norton* v. *McShane*, 332 F.2d 855, 862 (1964) to support their contention that the appellee Attorney General was acting under color of federal law and not state law. The case does not support their contention. In that case the suit was brought against federal officials who derived their authority from federal law. In this case the appellees are state officials acting under authority of state law. The appellee Attorney General rendered a legal opinion pursuant to a Minnesota State Statute, M.S.A. 8.02, and appellee Secretary of State Donovan derived his authority in regard to the acceptance of nominating petitions under Minnesota State Statutes 202.09, et seq.

To determine whether an official is acting under color of state law, the relevant laws are those of the state and local government—charters, statutes and ordinances—which clothe the officials with the authority of their offices. Congress could not have intended that state officials could exempt themselves from the provisions of the Federal Civil Rights Act by allowing them to assert that they believed

the United States Constitution or Acts of Congress allowed them to so act.

If the appellees' contention is accepted, then any state official could freely censor literature or speech with the bland assertion that the literature or speech was outside of the protections of the First Amendment.

This distinction is found in *Harman* v. *Forssenius, supra.* The Supreme Court sustained Federal Civil Rights Act jurisdiction and the convening of a three-judge court where state officials relied upon their interpretation of the Twenty-Fourth Amendment to the United States Constitution and implemented a state scheme requiring payment of a poll tax.

Bomar v. *Keyes,* 162 F.2d 136 (2d Cir. 1947) supports the appellants' contention that appellees Head and Donovan were acting under the color of state law. The state officials in *Bomar* were governed by the New York Education Law just as appellee Head's authority to issue opinions is governed by Minnesota Statute 8.02 and appellee Donovan's authority to accept nominating petitions is governed by Minnesota Statutes 202.09, et seq. In *Bomar* the state officials interpreted the Federal Judicial Code to support their refusal to excuse a teacher's absence from her job to do jury service, just as appellees Head and Donovan interpreted the Communist Control Act of 1954 to justify their actions.

Appellants urge the court to note probable jurisdiction on the basis of the Federal Civil Rights Act, 28 U.S.C.A. 1343, because the appellees were acting under color of state law in denying the appellant candidates a place on the ballot.

Appellants also contend there is original jurisdiction of the subject matter under 28 U.S.C.A. 1331. Appellees have consistently conceded that there are substantial federal questions raised in the challenge to the constitutionality of 50 U.S.C.A. 841, 842. However, they take the position that the requisite $10,000 has not been proven.

Appellants have urged that a court may presume that the matter in controversy exceeds the sum or value of $10,000 in a voting rights case. Appellants properly pleaded the jurisdictional amount. In *Wiley* v. *Sinkler,* 179 U.S. 58 (1900), a voting rights case, the Court ruled that the lower court inappropriately held that the amount in controversy was insufficient to support the jurisdiction of the court. Also, in *Swafford* v. *Templeton,* 185 U.S. 487 (1902), the Court likewise held that the wrongful refusal of state election officials to permit the plaintiff to vote for a member of Congress at a national election violated constitutionally protected rights, and did not require a showing of facts to support an actual monetary loss. The fact that these cases were brought in the form of actions for damages is irrelevant. They stand for the proposition that a man's right to vote may be alleged to involve damage capable of estimation in money, and that jurisdiction is properly conferred upon that allegation.

In *Giles* v. *Harris,* 189 U.S. 475 (1902), the Court held that the predecessor of 28 U.S.C.A. 1331 conferred original jurisdiction on the federal court in an *equity* action in a voting rights case, citing *Wiley* and *Swafford,* and *Mills* v. *Green,* 159 U.S. 651 (1895).

In *Howard* v. *Ladner,* 116 F. Supp. 783 (S.D. Miss. 1953), jurisdiction was premised solely on 28 U.S.C.A. 1331. Although there was the possibility of Federal Civil Rights

Act jurisdiction in the case, an examination of the briefs and record indicates that jurisdiction under the Civil Rights Act was omitted by error of counsel. Moreover, the dismissal of the case on jurisdictional grounds was over the strong dissents of Mr. Justice Black, Mr. Justice Reed and Mr. Justice Douglas who would have postponed the jurisdictional questions to a hearing on the merits. Appellants believe a study of the briefs and record indicates that the dismissal was for want of a substantial federal question "arising from" the Constitution, and not from want of jurisdictional amount under 28 U.S.C.A. 1331.

However, even if this Court required a specific showing of a monetary loss of $10,000 in this case, the appellants have not had the opportunity to show it. See *Oestereich v. Selective Service Sys. L. Bd. No. 11, Cheyenne, Wyo.*, 89 S. Ct. 414, 417 (1968). The case has not been heard in trial upon appellants' notice of trial, but was finally disposed of on a motion to dismiss as moot.

(2) *Whether a three-judge district court was properly convened pursuant to 28 U.S.C.A. 2282.*

The three-judge district court, in its two opinions of October 2, 1968, and July 14, 1969, unanimously found that a three-judge district court was properly convened.

Appellants urge the Court to find that the three-judge court properly held there was basis for convening a three-judge court. The relief requested prior to the election was sufficient to confer jurisdiction on a three-judge court. The complaint asked for an injunction to require the appellees to place the appellant candidates on the ballot. This was coupled with a request for a declaration that 50 U.S.C.A.

841 and 842 are unconstitutional. If granted, this relief certainly would restrain the enforcement, operation or execution of the Act.

However, under the facts of the present case, even if an injunction were not requested prior to the November 5 election, a three-judge court is warranted. In *U. S.* v. *149 Gift Packages,* 52 F. Supp. 993 (E.D.N.Y., 1943), the court considered a case of libel against 149 gift packages alleged to have been misbranded. The answer did not deny misbranding but alleged a counterclaim which attacked the statute as unconstitutional. The counterclaim by its terms did not ask for an injunction. Yet the court ruled that the relief requested had the effect of restraining the enforcement of the statute and ruled a three-judge court necessary. See also *Rolls-Royce* v. *Stimson,* 56 F. Supp. 22 (D.D.C. 1944).

In the present case, the granting of the temporary injunction by the three-judge court, if it were coupled with a declaration that 50 U.S.C.A. 841 and 842 are unconstitutional, would effectively restrain the enforcement, operation or execution of the Act by either state or federal officials. This is not a case where the Act has often been before the courts, which would make claims of constitutionality frivolous, and a three-judge court unnecessary. See *Acret* v. *Harwood,* 41 F. Supp. 492 (S.D. Cal. 1941) and *Bailey* v. *Patterson,* 369 U.S. 41 (1962).

Moreover, if the granting of injunctive relief is inappropriate after the election, jurisdiction of a three-judge court does not evaporate. In *Zwickler* v. *Koota,* 389 U.S. 245 (1967), this Court accepted a direct appeal from a three-judge court to consider a claim for declaratory relief that a state penal statute was unconstitutional, even though there

were no special circumstances which would allow the court to issue injunctive relief. Also, in *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), this Court heard a declaratory judgment suit direct appeal from a three-judge court.

CONCLUSION

Appellants urge that the three-judge court's holding that there is original jurisdiction under the Federal Civil Rights Act, 28 U.S.C.A. 1343 and that a three-judge court was properly convened pursuant to 28 U.S.C.A. 2282 be affirmed by this Court by noting probable jurisdiction. If this Court believes there is some question as to jurisdiction, the appellants urge the Court hear the merits and postpone the question of jurisdiction to a hearing on the merits.

Respectfully submitted,

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December 9, 1969